

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking to Promote Policy  
and Program Coordination and Integration in  
Electric Utility Resource Planning.

Rulemaking 04-04-003  
(Filed April 1, 2004)

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Consistency in Methodology and Input  
Assumptions in Commission Applications of  
Short-run and Long-run Avoided Costs,  
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(Filed April 22, 2004)

**APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E),  
SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E), SAN DIEGO GAS &  
ELECTRIC COMPANY (U 902-E), THE UTILITY REFORM NETWORK,  
AND THE DIVISION OF RATEPAYER ADVOCATES FOR REHEARING OF  
DECISION 07-09-040**

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Pursuant to Public Utilities Code section 1731 and Rule 16.1 of this Commission's Rules of Practice and Procedure ("Rules"), Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), San Diego Gas & Electric Company ("SDG&E"), The Utility Reform Network ("TURN") and The Division of Ratepayer Advocates ("DRA") (collectively, the "Joint Parties") file this Application for Rehearing of D.07-09-040 (the "Decision"), mailed on September 25, 2007.<sup>1</sup>

**I.**

**INTRODUCTION AND SUMMARY OF REHEARING APPLICATION**

The Decision addresses a number of significant issues concerning pricing and policy for California's qualifying facilities ("QFs") and investor-owned utilities. Unfortunately, the Decision commits legal error in several respects, and defers implementation of both pricing and contracting terms necessary to comply with the Public Utilities Regulatory Policy Act of 1978

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<sup>1</sup> Pursuant to Commission Rule 1.8(d), SCE is authorized to submit this Application for Rehearing on behalf of itself and all other Joint Parties.

(“PURPA”) going-forward to a later time. The Decision thus fails to provide either lawful pricing or implementation of PURPA.

As demonstrated below, the Decision’s conclusions on material and highly controversial issues contain no record support at all, and will produce pricing that systematically results in rates exceeding avoided cost. It is equally troubling that detailed implementation of the input values, formulas, and contract terms and conditions necessary to comply with PURPA have been relegated to an ill-defined workshop process, which promises neither an adequate opportunity to comment nor the prospect that a legally sufficient record can or will be produced. As a result, the Decision is more likely to produce controversy, confusion and litigation than much needed certainty in this sector of California’s energy market.

Many of the Decision’s legal errors can and should be remedied on rehearing. The Decision’s errors include:

- Applying the time of use (“TOU”) and time of delivery (“TOD”) factors adopted for the Market Price Referent (“MPR”) to the Market Index Formula (“MIF”).
- Relying on an outdated and discredited formula for the administrative heat rate (“AHR”), causing the MIF to systematically produce energy prices that necessarily exceed the utilities’ short run avoided cost of energy (“SRAC”) at the time of delivery, in violation of PURPA.
- Imposing an obligation on the utilities to purchase both energy and capacity from “small” QFs without regard to the utilities’ actual need for incremental capacity, in violation of PURPA and the Federal Power Act (“FPA”).
- Failing to order a retroactive true-up of SRAC energy payments even though the record on which prospective adjustments to the SRAC energy methodology is based also demonstrates the need for a retroactive adjustment.
- Adopting new energy and capacity prices but ordering the extension of the non-price terms of expiring standard offer contracts, thereby requiring the utilities to purchase energy and capacity at rates which necessarily exceed avoided cost.

Each of these grounds is discussed in detail below. In addition, given the absence of record evidence to support many of the ultimate findings on material issues, the Commission should

consider whether the process envisioned by the Decision for implementing many of its central pricing and policy directives is legally sufficient or appropriate.

## II.

### **THE DECISION'S APPLICATION OF MPR TOU FACTORS TO THE SRAC ENERGY PRICE IS LEGALLY AND FACTUALLY ERRONEOUS**

The Decision is the product of a proposed decision issued on April 24, 2007 (the “PD”), which was revised on July 20 and September 18, 2007 (the “Revised PD”), and an alternate proposed decision (the “APD”) issued on August 20 and subsequently revised on September 19, 2007 (the “Revised APD”), less than 24 hours prior to the Commission’s September 20, 2007 public business meeting. Noting the scant record of party proposals concerning whether existing TOU and TOD factors should be updated, the PD observed that “[u]nfortunately, the parties recommending specific changes to the TOU/TOD factors and periods did not provide a specific showing to support their recommendations.”<sup>2</sup> In the absence of sufficient record evidence to support revising the factors, the PD would have deferred consideration of the issue by directing the utilities “to provide updated TOU/TOD factors and periods when they file their next long-term procurement plans.”<sup>3</sup> Both the Revised PD and the APD adopted the same approach, relying on the lack of record evidence as a basis for concluding that the issue should be addressed at a later time.<sup>4</sup>

The day before the Commission was to vote on the Revised PD and the APD, an unexplained revision to the APD appeared on the Commission’s website. The Revised APD continued to assert the insufficiency of the record to support a change to the TOU/TOD factors, but paradoxically inserted new language adopting material changes to the existing factors:

[W]e believe it is appropriate to adopt TOU factors that are consistent with the adopted TOU factors for the Market Price Referent (MPR).... TOU factors are used in RPS to ensure that the

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<sup>2</sup> PD at 68.

<sup>3</sup> *Id.*

<sup>4</sup> Revised PD at 70; APD at 74.

time differentiated value of energy is appropriately taken into account when comparing projects against the MPR. In light of these parallels, it is reasonable to adopt here, as an interim approach, the TOD factors used in calculating the MPR, until we consider updates to the TOU/TOD factors and periods in a subsequent proceeding.<sup>5</sup>

The Decision, adopted by a unanimous Commission the following morning, contains this last-minute revision *verbatim*. However, as the Decision itself recognizes, revisions to the TOU and TOD factors cannot be supported by the record in this proceeding.

**A. The Decision Does Not And Cannot Make The Findings And Conclusions Necessary to Support Revising The Current TOU And TOD Factors.**

Public Utilities Code section 1757(a)(4) requires the Decision to be “supported by substantial evidence in light of the whole record.” In addition, Public Utilities Code section 1705 requires the Decision to “contain, separately stated, findings of fact and conclusions of law... on all issues material to the . . . [d]ecision.” The courts have long held that “[e]very issue that must be resolved to reach [an] ultimate finding is ‘material to the order or decision.’”<sup>6</sup> The courts have explained that:

Findings are essential to afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist other planning activities involving similar questions and serve to help the commission avoid careless or arbitrary action.<sup>7</sup>

Here, the Decision not only fails to make the requisite findings, but recognizes that the record is insufficient to make findings with respect to whether the existing TOU and TOD factors should be updated.

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<sup>5</sup> Decision at 74-75.

<sup>6</sup> *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 273.

<sup>7</sup> *California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251, 259 (*internal quotes and citations omitted*).

With respect to energy pricing, the “ultimate finding” required in this proceeding is that the Commission’s adopted SRAC energy pricing formula complies with PURPA.<sup>8</sup> The application of TOD factors to the avoided cost values adopted in the Decision necessarily affects the actual rate of payment made to QFs; therefore, whether or not the TOU and TOD factors should be updated and, if so, how, is an issue “that must be resolved” to support an ultimate finding as to the lawfulness of the updated SRAC methodology.<sup>9</sup> However, as each version of the PD, the APD and the Decision itself has recognized, there is no record evidence to resolve this material issue.

The record contains no evidence whatsoever as to whether the TOD factors adopted for use in connection with the MPR will produce lawful SRAC energy pricing under PURPA. No party proposed to use the MPR TOD factors in testimony, at hearings or in briefs.<sup>10</sup> As a result, application of MPR TOU factors to the SRAC energy price is not *and cannot be* supported by substantial evidence, as required by Public Utilities Code section 1757(a)(4).

Furthermore, the Decision does not contain separately stated findings of fact and conclusions of law demonstrating that use of the MPR TOU factors is appropriate, as required by Public Utilities Code section 1705. Indeed, the Decision could not make such findings because, as recognized in the Decision itself, there is no record to support such findings.

In *Northern California Power Agency*, the California Supreme Court considered whether “the Commission erred in failing to give adequate consideration to, and to make appropriate

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<sup>8</sup> Decision at 143 (Finding of Fact No. 2), 149 (Conclusion of Law No. 12).

<sup>9</sup> FERC’s regulations implementing PURPA expressly provide that “In determining avoided costs, the following factors *shall*, to the extent practicable, be taken into account: . . . (2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods. . . .” 18 C.F.R. § 292.304(e)(2) (*emphasis added*).

<sup>10</sup> Indeed, no party submitted testimony requesting a change to SCE’s TOU factors. *See, e.g.* CCC Opening Testimony, Ex. 102 at 54:17, 54:24-25 (“Edison’s existing TOU factors may not need to be changed.”). In comments on the APD, the Independent Energy Producers Association (“IEP”) makes a passing reference to the TOD factors used to adjust the MPR, but offers no record support, empirical analysis or argument that employing these factors to adjust SRAC energy payments would be lawful under PURPA. These brief, and unsubstantiated comments, filed on September 10, 2007, long after submission of the record, do not provide a basis for updating the TOD and TOU factors.

findings on, the issues raised by the contention of NCPA that the contracts under which PG&E plans to purchase steam for [its] new generating units violate both state and federal antitrust laws.”<sup>11</sup> The case arose when the Commission granted PG&E a certificate of public convenience and necessity for the construction and operation of geothermal power plants despite NCPA’s antitrust claims.

In concluding that the Commission erred by failing to give adequate consideration to, and to make appropriate findings with respect to the issues NCPA raised, the Supreme Court rejected a number of arguments, including “PG&E’s contention that the Commission must have dealt with NCPA’s claims because it received evidence and heard legal arguments on the antitrust issues.”<sup>12</sup> Here, the error the Decision commits is far more serious because the issue of whether to use the MPR TOD factors was never considered in the record.

The Supreme Court’s holding in *NCPA* explains why the Decision errs in adopting the MPR factors in this case:

The task of the Commission extends far beyond the passive role of a sounding board. The Commission cannot discharge its duty by merely taking “cognizance of the contracts between PG&E and its steam suppliers,” *without evaluating their effect upon the interests of the public*. It must weigh the opposing evidence and arguments in order “to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public.”<sup>13</sup>

The Decision errs by adopting new TOD and TOU factors, and rehearing should be granted.

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<sup>11</sup> *Northern California Power Agency v. Public Util. Com.* (1971) 5 Cal.3d 370, 372 (“*NCPA*”).

<sup>12</sup> *NCPA* at 379 (*emphasis original*).

<sup>13</sup> *Id.* (*citation omitted; emphasis added*).

**B. The SCE and PG&E MPR Factors Reflect Values For Both Energy And Capacity; It Is Both Factual And Legal Error to Apply These Factors To An Energy-Only Price.**

The MIF is intended to reflect the utilities' short-run avoided cost of *energy*. The Decision adopts separate values for firm and as-available capacity. In Decision 96-12-028 the Commission explained its rationale for the use of time-differentiated pricing for SRAC energy:

Time differentiation (i.e., the time-of-use (TOU) pricing indicators for peak and off-peak delivery of energy) provides important price signals. Time differentiation is consistent with the provisions of § 390(b) and should be retained as an important element of *SRAC* pricing.<sup>14</sup>

Had the Commission developed a record on the issue, the evidence would have demonstrated that the PG&E and SCE MPR TOU factors are not appropriate for time-differentiating QF energy payments because they do not have separate factors for energy payments and capacity payments.<sup>15</sup> Unlike the time-differentiation factors adopted with respect to SRAC, the PG&E and SCE MPR factors are “all-in” factors that apply to the combined energy and capacity payments made to renewable resources.<sup>16</sup> Thus, to apply PG&E and SCE’s MPR factors to an SRAC price for energy only is both factually and legally flawed. It is factual error because it confounds “all-in” factors with energy-only factors. It is legal error because the “all-in” factors adopted in the Decision will consistently produce payments that exceed the utilities’ avoided cost of energy, in violation of PURPA.

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<sup>14</sup> D.96-12-028; 69 Cal. PUC 2d 546, 553 (*emphasis added*).

<sup>15</sup> This statement is inapplicable to SDG&E because unlike SCE and PG&E, SDG&E’s MPR TOU factors do not include a specific capacity component.

<sup>16</sup> With respect to the MPR TOD factors, the Commission has stated that “TOD profiles provide a reasonable estimate of the value of energy and capacity provided by the resource...” (D.05-12-042 at 21; *emphasis added*); “TOD factors should recognize the extent of the need for additional *capacity*.” (D.06-05-039 at 69; *emphasis added*.)



### III.

#### **THE MIF VIOLATES PURPA**

The Decision would calculate the heat rate in the MIF “by taking an average between an NP15/SP15-derived value as generally proposed by SCE, and the existing administratively determined heat rate pursuant to prior Commission decisions.”<sup>17</sup> This approach commits legal and factual error in several respects.

First, this “hybrid” approach is not based on anything in the record of this proceeding. No party advanced such a formula; there was no opportunity to test it in cross-examination, and, therefore, the methodology runs afoul of Public Utilities Code sections 1705 and 1757(a)(4) for the reasons described above.

Second, the Decision would determine the AHR using a formula that is now more than ten years old. D.96-12-028 employed a “[s]tarting energy price, based on 12-month averages of recent, *pre-January 1, 1996* SRAC energy prices....”<sup>18</sup> The Decision itself acknowledges the outdated nature of the administrative heat rate formula:

PG&E and SDG&E have been on the SRAC energy Transition Formula since it was originally established in 1996 per D.96-12-028, and include unchanged IERs and utility factors. The latter utility factors are a result of “regression [analysis] describing the historical relationship between changes in border gas costs and ... [a utilities’] calculated avoided cost” (D.01-03-067, p. 5). *The regressions were based on 1994-1995 data.*<sup>19</sup>

The incorporation of such stale data cannot possibly result in an energy price that reflects the utilities’ current SRAC at the time of delivery, as required by PURPA and FERC’s implementing regulations.<sup>20</sup> There is nothing in the record to suggest that a rate determined ten years ago would equal the current avoided cost of energy at the time of delivery. To the

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<sup>17</sup> Decision at 66.

<sup>18</sup> D.96-12-028; 69 Cal. PUC 2d 546, 557, Attachment 2.

<sup>19</sup> Decision at (*emphasis added*).

<sup>20</sup> See 18 C.F.R. § 292.304(d)(2).

contrary, in D.02-02-028, the Commission recognized that the formula it adopted in D.96-12-028 had

been in place for over 4 years. *It would be unreasonable to believe that this interim formula would still accurately reflect current utility avoided costs.*<sup>21</sup>

The Decision does not explain how a formula that no longer reflected current utility avoided costs in 2002 can now, more than five years later, be used as a component in the calculation of current SRAC.

Employing an AHR that relies in part on “pre-January 1, 1996 SRAC prices” fails to recognize the substantial changes that have occurred since then with respect to the utilities’ alternative sources of supply. During the “pre-January 1, 1996” period, the utilities had not yet divested their power plants. Today, long after the divestiture, the utilities rely on the NP-15 and SP-15 markets for their incremental energy needs and to dispatch their resources.<sup>22</sup> As the Commission has recognized, “When a utility changes the source of energy it would otherwise rely upon, it is appropriate that it change the basis on which it calculates avoided costs.”<sup>23</sup> The Decision’s reliance on an outdated formula fails to recognize the changes in the utilities’ supply alternatives; therefore, the Decision’s formula cannot yield even an approximation of current SRAC at the time of delivery.

The Decision’s stated reason for incorporating the AHR into the MIF is the erroneous and unsupported conclusion that “using NP15/SP15 prices alone would likely result in SRAC prices that understate utility avoided costs, as they do not include the full range of generation resources in the electricity industry today and do not include out of market transactions.”<sup>24</sup> However, this

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<sup>21</sup> D.02-02-028 at 12 (*emphasis added*).

<sup>22</sup> Decision at 55.

<sup>23</sup> D.96-02-070; 65 Cal. PUC 2d 31, 32.

<sup>24</sup> Decision at 63.

approach is directly contrary to the Decision's explicit recognition that "continuing to use the administratively set heat rate may result in SRAC prices that exceed utility avoided cost."<sup>25</sup>

After announcing "the short comings of both proposed methodologies," the Decision adopts a 50/50 weighting of a MHR and an AHR. The Decision's obvious compromise solution and its ultimate finding that the MIF will now yield a price that conforms with PURPA is not supported by findings. It is entirely unclear how a methodology that would be unsound as a means of determining 100% of the value of SRAC can be a sound means of determining 50% of the value.

In *California Manufacturers Assn.*, the California Supreme Court annulled a Commission decision because the decision lacked sufficient findings and evidence to support the Commission's method of allocating a rate increase among utility customers.<sup>26</sup> The Court noted that the Commission's staff had "proposed six different methods of spreading the increase in the revenue requirement among the users...." and that the Commission found "that the need for a conservation oriented rate design is critical...."<sup>27</sup> The Court held:

The findings on the material issues are insufficient to justify the rate spread adopted. While the Commission's asserted justification for changing its method of spreading [the] rate increase is conservation of natural gas resources, *neither finding nor evidence exists showing the method adopted will result in conserving more natural gas than would other proposed methods.*<sup>28</sup>

The same absence of supporting findings and evidence the Court found erroneous in *California Manufacturers Assn* exists here. The Decision claims that NP-15/SP-15 market prices, alone, should not be used to determine SRAC energy payment because they "do not include out of market transactions."<sup>29</sup> However, the Decision does not explain why use of an

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<sup>25</sup> *Id.*

<sup>26</sup> *California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251.

<sup>27</sup> *Id.* at 255.

<sup>28</sup> *Id.* at 259 (*emphasis added*).

<sup>29</sup> Decision at 63.

outdated heat rate will compensate for this claimed flaw in using market prices directly. Nor does the Decision explain how the adopted 50/50 weighting will yield a price that comports with the Decision's ultimate finding that the MIF's SRAC price complies with PURPA. Indeed, it is difficult to imagine how a pre-1996 heat rate could bear any relationship to out-of-market transactions in the current NP-15/SP-15 markets. The Decision's use of outdated, historical heat rates is not supported by appropriate findings of fact and conclusions of law. Therefore, the Decision violates Public Utilities Code section 1705 and is not supported by substantial evidence, as Public Utilities Code section 1757(a)(4) requires.

Furthermore, the "historical" heat rates adopted in the Decision are not even calculated correctly. The Decision states that:

[f]or PG&E and SDG&E, the ["historical" heat rates] are the heat rates adopted in D.96-12-028 corresponding to the values of 9,794 Btu/kWh and 9,603 Btu/kWh, respectively. For SCE, we adopt the CCC proposal of a heat rate of 9,705. This value represents the average administrative heat in effect for SCE under the Transition Formula adopted in D.96-12-028 and modified in D.01-03-067.<sup>30</sup>

These "historical" heat rates are based entirely on erroneous calculations presented for the first time in the APD and are contrary to the record in this proceeding. No party submitted testimony regarding the historical heat rate calculations and there was no opportunity to test the Decision's calculations through cross-examination. Thus, there is no substantial evidence to support the Decision's "historical" heat rates, as Public Utilities Code section 1757(a)(4) requires.

Moreover, the utilities' "historical" heat rates in fact are substantially lower than those adopted in the Decision. Among other things, the Decision apparently (because the Decision does not explain its derivation) miscalculated the heat rates by multiplying the starting SRAC price in the Transition Formula –  $P_{\text{Base}}$  – by the utility factor and dividing by a *border* gas price instead of a *burnertip* gas price. The resulting heat rates for all three utilities are inflated by hundreds of Btu/kWh.

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<sup>30</sup> *Id.* at 66.

Based on this flawed calculation, CCC presented a false “average” historical heat rate for SCE, claiming that D.01-03-067 revised the heat rate in SCE’s Transition Formula equation from 10,522 Btu/kWh to 9,140 Btu/kWh.<sup>31</sup> This is obviously incorrect.

As the Decision acknowledges:

with regard to SCE, the utility was on the Transition Formula until 2001 when it was effectively replaced by the Modified Transition Formula per D.01-03-067. Although SCE’s fixed factor was replaced by a dynamic factor that changes monthly, *the SCE SRAC formula still contains an original 1996 IER.*<sup>32</sup>

D.01-03-067 confirms that it did not change SCE’s Transition Formula heat rate.<sup>33</sup> Thus, the Commission’s own decisions unequivocally belie CCC’s argument and demonstrate that SCE’s heat rate under the Transition Formula was and always has been 9,140 Btu/kWh – both before and after the issuance of D.01-03-067, not an average of 9,705 Btu/kWh as claimed by CCC.<sup>34</sup> CCC’s 10,522 Btu/kWh heat rate has no factual basis in this record or elsewhere and is plainly refuted by the Commission’s own decisions.

Similarly, the Decision ignores record evidence and the Commission’s previous decisions concerning the “historical” heat rates, which demonstrate that PG&E’s “historical” heat rate is 9,464 Btu/kWh<sup>35</sup> and that SDG&E’s “historical” heat rate is 9,264 Btu/kWh.<sup>36</sup> Indeed, these heat rate values were adopted in I.89-07-004 pursuant to settlement agreements to which CCC was a party.<sup>37</sup> For the foregoing reasons, the “historical” heat rate values adopted by the Decision are not supported by appropriate findings of fact and law, in violation of Public Utilities

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<sup>31</sup> See CCC APD Comments, filed September 10, 2007 at 8 n.21.

<sup>32</sup> Decision at 45 (*emphasis added*).

<sup>33</sup> See D.01-03-067 at 6, 13, 31 and 34.

<sup>34</sup> See *id.*

<sup>35</sup> See PG&E Comments on APD at 4, n.13; PG&E Ex. 29, p. 3A-3, n.2.

<sup>36</sup> SDG&E’s IERs were approved in ECAC proceedings in D.94-04-078, 54 Cal. PUC 2d 167, and D.95-04-076, 59 Cal. PUC 2d 455.

<sup>37</sup> See D.96-12-028, 69 Cal. PUC 2d 549-50. See also *id.* at 553 (“This formula has been computed by using the 1995 averages for [SRAC] prices paid by SCE and 1994 and 1995 average for short-run prices paid by PG&E.”). These 1994 and 1995 prices were calculated from heat rates filed in the utilities’ ECAC filings.

Code section 1705, and are not supported by substantial evidence, as Public Utilities Code section 1757(a)(4) requires.

#### IV.

#### **THE NEW “SMALL QF OPTION” VIOLATES PURPA**

The Decision errs by making the standard offer contract options described in the Decision available to “QFs under 20 MW, or that offer equivalent annual energy deliveries of 131,400 MWh, and that consume at least 25% of the power internally and sell 100% of the surplus to the utilities”<sup>38</sup> regardless of the utilities’ respective resource needs. This is legal error even though the Decision “caps the total amount of QF power under the Small QF option to 110% of each [utility’s] capacity as reflected in Table 5” of the Decision.<sup>39</sup> The Commission cannot lawfully require the utilities to enter into standard contracts without considering need and limiting the availability of the contract to the utilities’ resource needs. Indeed, the Decision expressly recognizes this requirement by subjecting the availability of standard offer contracts for QFs larger than 20 MW to limitation based on the utilities’ actual need.<sup>40</sup>

In *City of Ketchikan*, a QF sought “payment for capacity from [its] proposed project, regardless of whether [its] capacity is needed.”<sup>41</sup> FERC denied the request as “not required by PURPA or our regulations.”<sup>42</sup> FERC concluded: “We make this finding because, as we have stated previously, *there is no obligation under PURPA for a utility to pay for capacity that would displace its existing capacity arrangements.*”<sup>43</sup> “[W]hile utilities may have an obligation under

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<sup>38</sup> Decision at 147 (Finding of Fact No. 43).

<sup>39</sup> *Id.* at 123.

<sup>40</sup> D.07-09-040 at 150 (Conclusion of Law No. 18).

<sup>41</sup> *City of Ketchikan, Alaska, et al.*, (“*Ketchikan*”) (2001) 94 FERC ¶ 61,293, *reh’g. denied*, 95 FERC ¶ 61,194 (2001), 94 FERC at 62,062.

<sup>42</sup> *Id.*

<sup>43</sup> 94 FERC at 62,061, *footnote omitted, emphasis added, citing Connecticut Light and Power Company* (1995) 70 FERC ¶ 61,012, *reconsideration denied*, 71 FERC ¶ 61,035 (1995), *appeal dismissed, Niagara Mohawk Power Corporation v. FERC* (D.C. Cir. 1997) 117 F.3d 1485 (“*CP&L*”).

PURPA to purchase from a QF, that obligation does not require a utility to pay for capacity that it does not need.”<sup>44</sup> PURPA does not require utilities to purchase unneeded QF capacity.<sup>45</sup>

Moreover the Commission has repeatedly acknowledged the potentially serious consequences of decoupling mandatory purchase obligations from resource need. The standard offer contracts of the 1980s were made available without limiting them to actual need, resulting in significant oversubscription and stranded costs. This mistake ultimately cost customers billions of dollars in overpayments.<sup>46</sup> The Commission later noted that its “considerable experience with QFs proves quite conclusively that efforts to address the quantity of QF subscription to a standardized offer without addressing the associated contract price [were] misguided and damaging.”<sup>47</sup> The Commission should not repeat the errors of the 1980s by imposing on utilities an obligation to contract for QF power without regard to the utilities’ need for such power.

**V.  
THE DECISION COMMITS LEGAL ERROR BY FAILING TO ORDER A  
RETROACTIVE TRUE-UP OF SRAC ENERGY PAYMENTS**

The Decision states that it “updates the methodology for calculating SRAC energy prices on a prospective basis only, to ensure that SRAC prices continue to reflect utility avoided cost in the changing electricity markets in California.”<sup>48</sup> The Decision further states that “the record in this proceeding does not support a conclusion that the [SRAC transition formula] yielded prices that exceed utility avoided cost or systematically violated PURPA.”<sup>49</sup> The Decision does not contain separately stated findings of fact and conclusions of law to support this unsubstantiated

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<sup>44</sup> 94 FERC at 62,062, *citing CP&L*.

<sup>45</sup> FERC Docket No. RM06-10-006, Notice of Proposed Rulemaking, *Regulations Applicable to Small Power Production and Cogeneration Facilities*, 71 FR 4532, 4533.

<sup>46</sup> D.98-09-040; 82 Cal. PUC 2d 87 at 92.

<sup>47</sup> D.96-10-036; 68 Cal. PUC 2d at 442.

<sup>48</sup> Decision at 9 (*emphasis added*).

<sup>49</sup> *Id.*

claim, as required by Public Utilities Code section 1705. Nor are these statements supported by substantial evidence, as required by Public Utilities Code section 1757(a)(4).

Consideration of whether to make retroactive adjustments to historical energy payments made using a formula that is acknowledged by the Decision to require revision to comply with PURPA going forward is necessarily a material issue that must be resolved. As stated by the California Court of Appeal in a case addressing this precise issue less than four years ago, the Commission has a *legal duty* to make retroactive adjustments to SRAC pricing to ensure compliance with PURPA.<sup>50</sup> The Court of Appeal reviewed Commission decisions D.03-12-062 and D.04-01-050, which ordered the utilities to enter into new standard offer contracts beginning in 2004, and expressly held that the Commission was required to determine in this very docket whether the evidence demonstrated a need for retroactive refund of SRAC energy payments made pursuant to these new standard offer contracts to ensure that QFs were paid no more than avoided cost. “[I]f the evidence shows that [a modified SRAC] formula . . . should have been applied retroactively to arrive at a more accurate SRAC, then it is the Commission’s duty to apply it retroactively.”<sup>51</sup> Indeed, the Court of Appeal also noted that the Commission declared “that if a decision in R.04-04-025 shows a systematic violation of PURPA, then Edison is to be given credit for any PURPA violations by reason of Edison being required to enter into SO1 contracts with QFs . . . .”<sup>52</sup>

The Decision’s summary rejection of any retroactive refunds, in contravention of the evidence in this proceeding, ignores the express directives of the Court of Appeal on remand and also exceeds the Commission’s jurisdiction under PURPA. The same evidence the Decision cites to support its change to the SRAC energy payment formula (the MIF) as of September of 2007 inescapably supports the retroactive change to the MIF as of 2004. Indeed, there is no

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<sup>50</sup> See *S. Cal. Edison Co. v. Cal. P.U.C.*, 128 Cal. App. 4th 1, 12 (2005); see also *S. Cal. Edison Co.*, 101 Cal. App. 4th at 999.

<sup>51</sup> *S. Cal. Edison Co.*, 128 Cal. App. 4th at 12 (quoting *S. Cal. Edison Co.*, 101 Cal. App. 4th at 999).

<sup>52</sup> *S. Cal. Edison Co.*, 128 Cal. App. 4th at 12.



evidence in the record that would support any other result. The opening testimony in this proceeding was submitted in August of 2005 and was necessarily based on pricing data from 2004 and earlier years. The Decision fails to provide any explanation as to why the new MIF should not be applied retroactively. Moreover, the Decision rejects any retroactive refunds without even considering the magnitude in reduction in SRAC energy payments that would have resulted if the new MIF pricing formula were applied retroactively.

The Commission should grant rehearing and order that the MIF be applied retroactively as of 2004.

## **VI. THE DECISION COMMITS LEGAL ERROR BY ORDERING THE EXTENSION OF NON-PRICE TERMS OF EXISTING CONTRACTS**

The Decision states that “existing firm capacity QF resources whose contracts expire before the contracts required by this decision are available . . . may extend the non-price terms and conditions of the expiring contract and continue service with the pricing set forth in this Decision until the final contract is available.”<sup>53</sup> The Decision’s extension of “non-price” terms and conditions of existing standard offer contracts is not supported by substantial evidence, as required by Public Utilities Code section 1757(a)(4). Moreover, the Decision does not contain separately stated findings of fact and conclusions of law demonstrating that extension of “non-price” terms and conditions of existing standard offer contracts is consistent with PURPA, as required by Public Utilities Code section 1705.

FERC’s regulations implementing PURPA require the Commission to consider a number of factors in addition to the basic commodity price avoided by the purchase from a QF in determining avoided cost, including performance standards, dispatchability, outage terms, system emergency provisions, credit requirements and other contract terms.<sup>54</sup> Failure to take

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<sup>53</sup> Decision at 126.

<sup>54</sup> See 18 C.F.R. § 292.304(e).

such non-price factors into account can result in prices that exceed the utilities' avoided cost at the time of delivery, in violation of PURPA.<sup>55</sup>

Nothing in the record demonstrates that incorporating the *new* pricing adopted in the Decision into *existing* standard offer contracts will yield pricing consistent with PURPA's avoided cost standard. To the contrary, the evidence in this proceeding demonstrates that the terms and conditions of existing firm QF contracts are *not* consistent with the terms and conditions that are currently available from suppliers from which, but for purchases from QFs, the utilities would buy energy and capacity.

As an example, the Decision notes that existing firm standard offer contracts only require the QF to maintain an 80% capacity factor during the summer peak.<sup>56</sup> However, moving in the direction of more modern performance requirements,<sup>57</sup> the Decision provides that "the firm power contract option adopted in this decision establishes a higher level of performance by imposing penalties to the capacity payment for failure to deliver 95% of the contract power during on-peak months and 90% of the contract power during off-peak months (not counting scheduled outages)."<sup>58</sup> Existing standard offer contracts with an 80% performance requirement plainly provide less value than the new standard offer contracts with 95% and 90% performance requirements adopted by the Decision. The extension of "non-price" terms and conditions of existing standard offer contracts will necessarily result in less value on a unit basis of delivered energy and capacity from an alternative resource (or even pursuant to a QF resource operating under the terms the Decision deems reasonable in today's market). Thus, the extension will necessarily yield prices that exceed avoided cost, in violation of PURPA.

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<sup>55</sup> See *id.*; *S. Cal Edison v. Cal. P.U.C.*, 101 Cal. App. 4th 982, 998 (2002); *reh'g. denied*, 2002 Cal. App. LEXIS 4728 (2002), *review denied*, 2002 Cal. LEXIS 8129 (2002); *S. Cal. Edison v. Cal. P.U.C.*, 101 Cal. App. 4th 384, 398-99 (2002); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067, 61,246-47 (1997).

<sup>56</sup> See Decision attachment A at 1.

<sup>57</sup> See, e.g., Ex. 101, *Amended and Restated Parallel Generation Agreement Between Southern California Edison Company and Kern River Cogeneration Company*.

<sup>58</sup> Decision at 97.

The Commission should grant rehearing and eliminate the language in the Decision that orders the extension of “non-price” terms and conditions of existing standard offer contracts.

**VII.**  
**CONCLUSION**

For all the reasons discussed above, the Commission should grant rehearing of the Decision.

Respectfully submitted,

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October 25, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of the "**APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY (U 39-E), SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E), SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E), THE UTILITY REFORM NETWORK, AND THE DIVISION OF RATEPAYER ADVOCATES FOR REHEARING OF DECISION 07-09-040**" on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this 25th day of October, 2007, at Rosemead, California.

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Thursday, October 25, 2007

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